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ABSTRACT

Perspectives on federal regulation and academic freedom at U.S. colleges and universities are considered. It is claimed that under Title IX of the Higher Education Amendments of 1972, universities have by and large forfeited their right to decide for themselves who shall be admitted to the student body. The federal government has essentially acquired across-the-board power to decide which admissions criteria are appropriate, since it has declared any admissions policy discriminatory if it has a differential effect among groups. It is proposed that regulation of faculty hiring is even more intrusive than regulation of admissions, since many institutions are under specific orders to fill a stated number of openings with protected groups, and some are required to provide a written report on the qualifications, race, and sex of applicants and to state why they were not hired. Another issue is compliance with the Equal Pay Act in faculty hiring. The Department of Labor has failed to issue a definitive policy establishing criteria to be used in "equating" faculty in various disciplines. Federal intervention in classroom content is illustrated by federal proceedings against the North Carolina state system of higher education, whereby the government is demanding the right to approve the academic structure of each state college in order to ensure that they are "equal," and thus that one institution is no more attractive than another to potential applicants. Regulations pertaining to medical and social science research conducted at colleges and universities also threaten academic freedom. Regulations pertain to interviewing, observing, or gathering data and to the time faculty members spend on research and other professional activities. Another issue of concern is federal intervention in the area of contested dismissal of students. A few actions that might be taken to counteract these trends, including curbing the authority of Institutional Review Boards, are noted. A bibliography is appended. (SW)

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WELCOME TO FEDERAL U., CAMPUS #1037: REGULATION AND ACADEMIC FREEDOM

Only twenty years ago American colleges were free to choose their own faculty, their own students, and their own curriculum. They could conduct research on more or less any subject they chose. They could set whatever standards they thought best for residency and parietal rules and student conduct, from monastic to freewheeling. None of this required so much as notification to Washington.

Today they have lost all of these freedoms. They must justify to federal boards, in detail, their admissions and faculty hiring decisions, as well as many of their parietal rules. Most of their research is federally funded and approved, and the rest, as well as curriculum, is falling under closer and closer federal surveillance.

By 1975, according to an estimate by former Yale president Kingman Brewster, private liberal arts colleges were getting one-third of their total funds from the government. Among institutions with large scientific establishments, the dependence is even greater: the federal government now provides two-thirds of the funds for scientific research at universities. Philip Kurland of the University of Chicago Law School compares the universities' bargain with Faust's: "An academy that has sold its will--over the selection of faculty and students, over its curriculum and research--is no longer an academy."

According to official federal policy, backed by a court decision, a university can effectively avoid being considered a "recipient institution" and thus subject to federal dictates only if it: 1) turns down all forms of direct federal aid; and 2) forbids its students to accept any form of federal aid. If by some miracle it passes these tests, it must still contend with Internal Revenue Service (IRS) regulations which deprive it of its "educational" and "nonprofit" status unless it falls into line with what IRS considers "public policy." In practice, no institution of higher education in the country can escape unregulated.

THE BURDENS OF REGULATION

As of 1975, faculty members at Harvard alone spent some 80,000 hours of their time complying with federal regulations. Five regulatory programs alone cost the university from $4.6 to $8.3 million per year, according to Harvard president Derek Bok. In the same year Duke spent $3,618,070 on regulation and Georgetown $3,603,243. In 1976, according to the magazine Change, federal regulations cost institutions of higher education $2 billion. There is every reason to believe that all of these figures

have gone up in the past half decade. The costs of regulation, in fact, now approximately equal the total volume of private giving to colleges.

At the University of North Carolina-Greensboro, the task of compiling federal reports "swamped" the university's computer; as one administrator recalled, "All other uses of the computer stopped. For a six-month period we did nothing but HEW reports." One Greensboro report weighed twelve pounds. Reports abound of colleges which have had to scrap plans for new dormitories and libraries because of the capital cost of federally mandated wheelchair ramps and women's gymnasiums.

CHOICE OF STUDENTS: ADMISSIONS

Under Title IX of the Higher Education Amendments of 1972, universities have by and large forfeited their right to decide for themselves who shall be admitted to the student body. Institutions must make explicit admissions criteria available to regulators on demand. And any admissions criterion is discriminatory, the government says, if it has a differential effect among groups, regardless of whether or not that effect was intended: that is, a standard is considered discriminatory unless all groups do equally well on it. Universities may use unintentionally discriminatory criteria only if they can affirmatively show that the standards are related to later performance or some other university interest which the regulators decide is legitimate. (Special admissions programs used to meet quotas are of course legal.) Since most potential admissions criteria, from grades and test scores on down, do have a differential effect, the government has in essence acquired across-the-board power to decide which admissions criteria are appropriate and which are not. Officials reportedly told one divinity school to stop requiring knowledge of Greek and Hebrew as prerequisites for admission on the grounds that not enough minority applicants were familiar with the languages.

Ironically, the bureaucracy has not yet decided whether or not the most "discriminatory" institutions of all--single-sex colleges and black colleges--are legal. One government agency is subsidizing black colleges, while another is moving toward abolishing them. Single-sex colleges seem legal, but labor under various legal disadvantages, while single-sex scholarship funds at coeducated institutions are not.

In admissions, as elsewhere, medical schools have suffered from an unusually high degree of federal interference. In the "Guadalajara case," Congress attempted a few years back to force medical schools to admit Americans studying medicine abroad whether or not they met the admissions standards of the American schools. A substantial number of such students attend a medical school in Guadalajara, Mexico. But after a group of leading medical schools declared that they would rather lose their federal funding than be forced to accept students they didn't want, Congress backed down. In a typical "compromise", though, the government kept intact its right in principle to interfere with admissions decisions.

CHOICE OF STUDENTS: DISMISSALS

Regulators have not yet gotten deeply involved in dismissal decisions at universities, but the logic of existing regulation must lead them inexorably in that direction. An allegation of a racially motivated dismissal--or of a pattern of dismissing protected groups out of proportion

to their presence in the student body--would naturally lead regulators to monitor every detail of the academic process, Howard O. Hunter has suggested in the Emory Law Journal. That would include curriculum and test questions (both possibly "culture-loaded"), grading practices, course requirements, and so on.

Sidney Hook recounts a recent case in which a federal judge rushed in where the regulators feared to tread: "Not so long ago, a student won reinstatement to the (private) George Washington University School of Medicine, from which he had been expelled by its Evaluation Committee by a vote of thirteen to one, on the ground that for two successive years he had done academic work 'of marginal quality.'" The Evaluation Committee had previously granted the student a "second chance", allowing him to repeat unsatisfactory work under the supervision of a sympathetic faculty member of his choice. When his work still proved unacceptable--he placed 142 in a class of 151, and 151 of 151 in behavioral science--the University dismissed him...and he promptly sued for reinstatement. "Incredible as it seems," Hook says, "Chief Judge Harold H. Greene of the District of Columbia Superior Court ruled in the student's favor, and ordered him reinstated at the University...It is noteworthy that the student did not claim he was dropped because of racial, religious, or sexual reasons, or that he was discriminated against on personal grounds, or that he was denied due process and hearing." Instead he maintained that the dismissal had been "arbitrary", the University having promulgated no written standards on the quality of academic work.

It is still legally unclear whether or not private colleges may maintain parietal rules against abortions or out-of-wedlock pregnancies. Since a federal regulation forbids colleges from discriminating between these events and in-wedlock pregnancies (they are to treat them all as "disabilities"), it would seem that they may not. The Secretary of Education, however, does have the right to exempt a college from a regulation if she detects deep-seated religious objections. Nonsectarian institutions, as well as those whose religious convictions appear shallow to the Secretary, seem to be out of luck.

CHOICE OF PROFESSORS

Regulation of faculty hiring is even more intrusive than regulation of admissions. Former Congresswoman Edith Green, one of the original sponsors of the legislation leading to Title IX, describes the burden it can place on small colleges:

> In my city (Portland, Oregon) we have Reed College, historically a very liberal college. We know there is a surplus of professors--including Ph.D.'s. There were very few vacancies and I am told there were somewhere around 1,000 applicants. The regional office of HEW ordered Reed College to give them a written report on the background and qualifications and experience and race and sex of every person who applied and why they were not hired. Reed College has said it would take three people full-time just to do the paper work, and after that they have accomplished nothing. (Congressional Record, 10/1/74)

The perils of regulation are not solely financial. On July 3 a federal judge sent Prof. James Dinnan of the University of Georgia to prison for refusing to disclose how he voted on a colleague's promotion at a secret-ballot faculty meeting. Prof. Maija Blaubergs sued Dinnan and other members of the faculty promotion committee of the University's College of Education when they voted against promoting her. But Dinnan refused to tell the court how he voted, saying that making the secret-ballot votes public would open up committee members to outside pressure. To Dinnan, it was a simple matter of academic freedom: "If they keep on whittling away, there won't be anything left."

Dinnan's refusal constituted contempt of court, and so Federal District Court Judge Wilbur Owens fined the professor $3,000 and sentenced him to a 90-day prison term. (Dinnan turned himself in to federal marshals at Macon wearing his black academic robes, observing: "The entire university is being locked up.") Blaubergs's lawyer is threatening to ask the judge to renew the sentence if Dinnan still proves uncooperative after the 90 days. The University itself, meanwhile, is refusing to provide Dinnan with legal support, since its counsel had advised the professor to obey the court order.

Harvard sociologist Nathan Glazer points out that quota systems also run counter to the decentralized, department-by-department hiring of professors which traditionally characterizes the university. "The regulators are already very annoyed that college presidents and deans can't simply give orders, the way corporation presidents can," Glazer says, adding tnat college administrations, under federal prodding, are gradually acquiring more and more authority over once-independent department hiring practices. Many institutions, of course, are under specific orders to fill a stated number of openings with protected groups.

One problem that perennially crops up is that of preventing people from evading federal guidelines by "passing the color line" and claiming a race other than their real one. Since the resources available for "visual inspection" (going around campuses counting black and white faces) are limited, regulators will have to rely on less informal means, pioneered at the elementary school level, such as race review boards. California psychologist Dr. Henry Novotny describes one such procedure:

> The Los Angeles City school system distributed to all of the districts a set of requirements ("Memorandum 10"). Teachers who wish to change their previously stated racial identity must now present not only their birth certificates, but also verification of racial ancestry back to their grandparents. One presumes the European immigrants may use the birth certificates of the three ancestral generations which they had to obtain under the Nazi occupation to show they were not Jewish.

Undaunted by these difficulties, however, the authorities are pressing into new areas. One such effort is a Department of Labor lawsuit against Northeastern University, alleging violation of the Equal Pay Act in faculty hiring. Glazer quotes Estelle Fishbein:

> The Department selected 57 cases of alleged sex discrimination in salary levels, not one of which involved alleged inequity within the university's academic departmental structure. Labor is apparently contending that it can select matchmates for

female faculty members across department lines (one professor being likened to another), although nowhere has any statute or regulation given notice to universities that faculty in all departments must be paid the same, nor has any definitive policy statement been issued from the Department setting forth criteria to be used in equating faculty in the various disciplines.

In other words, it may be discriminatory to pay professors of quantum physics more than professors of French if the former is a more heavily male group.

CURRICULUM

From a newspaper account:

> Officials of the University of California at Berkeley say that a U.S.Labor Department inspector last year made unannounced and unrequested visits to monitor courses there and later told the school that changes would be needed because some of the classroom material was offensive.
>
> Officials of Berkeley's law school said the inspector, who is attached to the Oakland regional office of the Labor Department's Office of Federal Contract Compliance, told them that "too much talk of violence" was upsetting female students in a criminal law class, that some course material was "offensive," and that a course on Jurisprudence and Social Policy was "too conservative."
>
> The unsolicited critique by an inspector investigating employment practices brought a sharp rebuke from the university's administration, which called the classroom surveillance a clear violation of academic freedom...

Law school Dean Sanford Kadish said that the Labor Department inspector

> came to Berkeley last November and immediately began talking to school administrators about things they would have to do to remedy problems.
>
> "Apparently he decided we were guilty before he had even begun his investigation," Kadish said. "I thought this was somewhat premature."
>
> (The inspector) told the university administrators that remedies would include putting on some sort of special summer symposium to discuss discrimination (and said that) the Labor Department had authority to investigate affirmative action complaints in their "broadest sense."
>
> --Washington Star, 1/28/80

Federal officials backed off in the Berkeley case, denying that it had been their intention to interfere with curriculum. We might well wonder, though, whether the result would have been the same had the target institution not been as prominent and powerful as Berkeley, or had it not fought back.

In its proceedings against the North Carolina state system of higher education, the government is demanding the right to approve the academic structure of each state college in order to ensure that they are "equal", and thus that one is no more attractive to potential applicants than another. How one department or field of study is to be compared to another in the quest for "equality", and what the remedy is to be if one college disturbs the "equality" by unilaterally improving its own offerings, are questions which are likely to engage the attention of federal officials for many years. As in the case of contested dismissals, seemingly unrelated regulations are leading to intervention in classroom content.

The federal government may not have gone along with the demands of some feminists that it purge "sexist" course material from classrooms and libraries, but its restraint seems more a matter of political prudence than of principle. How far it could go if it wanted may be seen in the parallel local campaigns against insufficiently egalitarian textbooks at the elementary level. Among the books which "progressive" forces in various cities have targeted for removal from the classroom, as dangerous to juvenile morals: Mary Poppins, Huckleberry Finn (placed on the restricted list at Winnetka, Illinois' New Trier East High School after a seven-year campaign by a parent group), To Kill a Mockingbird, Mother Goose, and Dr. Dolittle. The last-mentioned has, in the words of Judith Krug of the American Library Association, "come under attack for presenting an inaccurate or distorted picture of current social and political philosophy." Whatever must they say about The Taming of the Shrew?

RESEARCH

Probably the most serious threat to freedom of research ever faced by American universities is the proposed new set of regulations concerning Institutional Review Boards (IRB's), groups originally established to protect the rights of people undergoing medical experiments. Under the new regulations, due later this year under an order signed by HEW chief Joseph Califano on his last day in office after being fired, every university student or professor, in every field of research whatsoever, and whether funded by the government or not, will need the permission of a government-mandated censorship board before interviewing, observing, or gathering data about anyone whomsoever. Any exceptions to this requirement will be at the discretion of the censorship authorities themselves.

This incredible new ruling--which would, for example, require a student to ask permission of the censorship board before assembling a file of news clippings critical of President Carter--rests on the flimsiest of legislative pretexts: an obscure amendment, enacted in response to abuses of cancer patients in medical research, which forbids the Public Health Service from funding research that violates the rights of test subjects.

Under the relentless logic of bureaucratic turf-building, HEW extended the regulations, first from PHS grants to all HEW grants, and then to all activities of "recipient institutions" whether or not carried on with government money. (This upped the ante in another way: since the sanction for infringing the regulations was now loss of all HEW money instead of loss of the tainted project,

university administrators had to intensify their pressure on wayward researchers.) Meanwhile, HEW was winning a turf war with other agencies which had their own ethical-research rules; President Carter issued an Executive Order giving HEW's standards primacy.

But the most imaginative leap in the regulations' scope was their extension from medical to social science (and all other) research. If researchers were violating a subject's rights by injecting him with dubious drugs without his informed consent, weren't they risking his psychological composure by interviewing or observing him under false pretenses, as sociologists so often do? And even if the researcher is not interviewing anyone, what about the risk to innocent persons' reputations if he should decide to unearth and publicize old scandals?

The resulting regulations, according to Thomas Bartlett, president of the Association of American Universities, are "either absurd or revolutionary. If, as is most likely, no one pays much attention to them, they are absurd. If by any chance they get enforced, they would be revolutionary." But Bartlett is too optimistic--not that it is reassuring to be told that the federal government is merely going to acquire censorship powers without using them. IRB's are already in operation, the proposed regulations merely clarifying their authority, and their behavior so far offers no grounds at all to hope they will be reasonable.

Professor Howard Higman of the University of Colorado sociology department gives some examples that have already taken place:

> A student wanted to go into an open air theater in the summer and watch the rehearsals of the Shakespeare Festival. He wanted to observe and put into a category those actors who obeyed the director and those who went right on doing what they had been doing before and didn't obey the director. And then on the basis of that he would see whether there was or was not a correlation between those who obeyed the director and those who got rave reviews.
>
> He submitted it to the Board because his professor said he had to. The Board looked at it and said he would have to have informed consent forms which meant that he would have to go to each of the actors and tell them what he was doing and have them agree it was all right for him to watch to see whether or not they were obeying the director. He abandoned the project, obviously.
>
> One person was turned down who wanted to look at marriage licenses on the grounds that they show ages of the applicants to see whether there was a growing, steady, or changing disparity between the ages of the husband and wife over a 10-year period...(h)e was told they would have to submit it because it was a public record.
>
> One undergraduate student wanted to watch ladies going into a Safeway store and classify them as to those who went in in pantsuits, dresses and blue jeans and see if there was

a correlation between their attire and the number of sacks they carried out. This, he was told, would require informed consent.

(In a biomedical case in Bethesda) six different boards had to approve in Baltimore before the thing could go. Due to their variety of meeting dates and so on, by the time it got to the six boards, the data was gone.

One would think that someone could carve out a middle ground between permitting researchers to inject unknowing subjects with diseases and forbidding them to do ordinary things which are permitted to everyone else.

Federal sanctions against unwanted research are proceeding on other fronts as well. One federally-funded legal group is suing the University of California to force it to stop pursuing research on agricultural labor-saving machinery. California Rural Legal Assistance (CRLA), an organization closely allied with Cesar Chavez' United Farm Workers union, opposes the research on the grounds that it tends to displace farm labor. Agriculture Secretary Bob Bergland has also announced that the federal government, reversing a longstanding policy, will not fund university research on labor-saving farm machinery. Not funding research in an area is hardly persecution, of course, even when two-thirds of all university research is federally funded. But it is noteworthy that the government now refuses to pursue research, not because it is unlikely to add to the sum of human knowledge, but because it is all too likely to do so.

Gene-splicing, the technology recently made eligible for patent protection by the Supreme Court, is another target of anti-research activists. In 1977 Senator Kennedy proposed a bill setting up a federal commission on recombinant DNA research. Though the issue was clouded by the presence of some important safety questions, much of the backing came from groups focusing on the technology's supposed political implications. Nobel Prize-winning MIT biologist David Baltimore wrote that "the bill was a clear invitation to begin the process of deciding what research shall be allowed and what research prevented." Or, as Senator Kennedy himself put it, "For the first time the principles of public accountability are being applied to the nation's science policy..." Kennedy did admit, however, that the prospect of being "accountable" to the government for the content of their research has "unsettled" many scientists, who--for some reason--"see it as a threat to the freedom of scientific inquiry or as the forerunner of government controls over science."

Federally funded research serves more and more as the lever by which government gets control of non-federally-funded university activity. A good example is an Office of Management and Budget (OMB) directive effective July 1 which would require university researchers working on federally funded projects to keep detailed accounts of how they spend each hour of their time--not just time spent on the project itself, but time spent on other professional activities as well. The idea is to catch researchers who claim to be spending time on research when they

are really performing other university business. The General Accounting Office (GAO), according to Wallace Ackley of the accounting firm Coopers & Lybrand, has complained that under the earlier, laxer procedure "research was often performed simultaneously with other activities including instruction."

Writes Yale President A. Bartlett Giamatti: "Federal accountants wish to have faculty effort divided into discrete functions totaling 100% (research, teaching, service, administration, etc.), while faculty point out that the overlap between these activities is so great that compartmentalization is misleading at best and dishonest at worst." Critics also suggest that the accumulation of detailed, federally-mandated data on virtually all faculty activity is likely to prove a temptation to those who want to control research.

WHAT CAN WE DO?

There are quite a few legislative initiatives which could slow down the federal juggernaut. One would be to clarify the tax laws to prevent IRS from using tax classifications to prod colleges into the regulatory cage. Another would be to classify colleges as "recipient institutions" only if they themselves, rather than their students, accept federal aid. A third would be to free from regulation those university activities which are not federally funded.

Curbing the authority of Institutional Review Boards (IRB's) must be high on any legislative shopping list. The minimal demand should be to restrict IRB's to scrutiny of research carried on with federal money. A further step could be to restrict the IRB's purview to what are called "physical interventions" on test subjects--injections, surgery, and the like. If research-review proponents wanted to monitor "psychological damage," they would then have to convince Congress at some later time that an extension of their authority was justified. A general rule of thumb might be that researchers would not be forbidden to carry on actions which are legal for the citizenry at large.

In the political minefield of admissions and faculty hiring, a few modest steps could curb some of the worst intrusions. Among them could be: explicitly banning federal interference with curriculum, sanctioning admissions criteria which do not have discriminatory intent, and allowing colleges to maintain different faculty pay rates in different departments. Congress could also end any doubt about the legality of private black and single-sex colleges and scholarship funds by legalizing them explicitly, and could safeguard the privacy of secret ballots in faculty committees.

Probably the most important single thing we can do to help academic freedom is simply to raise it again and again as an issue. Regulators, after all, seldom attack university autonomy head-on as a principle; their insensitivity to it comes about largely because they are charged with the advancement of other and conflicting interests. They will be inclined to respect the limits of academic freedom if, but only if, they see that there are a lot of people on the Hill and elsewhere who are unwilling to let it go without a fight.

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